

new UHF television station in Orlando in 1985. The permit was issued in 1986 and expired in 1988, during the appellate process, and the Commission extended or reinstated the permit four times between 1988 and 1990. Yet, RBC stated in its fifth and sixth extension applications that it had not ordered any equipment to construct its facilities. In a supplement to the sixth extension application, filed November 27, 1991, nearly four months after the end of the latest extension period, RBC stated that it had that month completed the construction of a transmitter building at its transmitter/antenna location. RBC stated that it had begun the construction in July 1991, and that it was still engaged in the selection of equipment for the station.

171. The findings also show that, in March 1993, the Video Services Division requested RBC to provide a detailed explanation of what specific actions towards construction it had taken since November 27, 1991. RBC responded that it took *no further actions* after that date even though it had repeatedly promised the Commission to complete construction and be on the air by December 1992. RBC claimed that release of the funds needed to purchase equipment and construct the station was tied to Commission approval of the *pro forma* assignment application to RBL. However, RBC did not advise the Commission in the assignment application that consent to the proposed assignment was essential to construction, or that RBC's previous representations concerning its "read[iness], willing[ness] and ab[ility]" to construct might no longer be valid. In this regard, the Commission has held that reorganization of a permittee and the infusion of new capital are not bases for the grant of an extension application. See *High Point Community Television, Inc.*, 2 FCC Rcd 2506, 2507 (1987). Furthermore, because RBC filed the assignment application several months after the

end of its last extension period, it is irrelevant to its showing concerning the lack of substantial process of progress during that time.

172. In any event, it is well established that the mere filing of an assignment application does not entitle a permittee to a grant of an extension application. *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026, 6029 (1991); *Rappaport Communications, Inc.*, 2 FCC Rcd 175 (1987); *New Orleans Channel 20, Inc.*, 104 FCC 2d 304, 314 (1986), *aff'd*, 830 F.2d 361 (D.C. Cir. 1987). When the Commission revised its rules in 1985 to establish stricter guidelines for the granting of extension applications, *In the Matter of Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations*, 102 FCC 2d 1054 (1985) (*Construction of Broadcast Stations*), it deleted that part of Section 73.3534 of the Rules that had permitted grants of extension applications upon a showing of "other matters," such as the pendency of an assignment application and the assignee's ability to quickly construct the station. See *Community Service Telecasters, Inc.*, 6 FCC Rcd at 6029; *Community Telecasters of Cleveland, Inc.*, 58 FCC 2d 1296, 1303 (Rev. Bd. 1976) (even under the old rule, the permittee's extension of time request filed for the purpose of assigning the permit and recovering its expenses did not warrant grant of an extension); *Hymen Lake*, 56 FCC 2d 379, 381 (Rev. Bd. 1975).

173. Concerning its construction efforts during the January-June 1991 extension period, RBC could not and did not claim in its sixth extension application that construction had been completed. Similarly, RBC could not and did not point to any substantial construction. The only "progress" it reported was that it had notified the tower owner of its intention to proceed with construction, that it had "initiated discussions with equipment

manufacturers," and that it "intend[ed] to place its equipment order as soon as the building construction schedule is finalized." It is concluded that this did not constitute substantial progress because it reflects no progress at all. The Commission expects more of a permittee than sending a few letters and memos to the tower owner and initiating discussions with equipment manufacturers. *See* Section 73.3534(b)(2) ("Substantial progress" requires a "demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion"); *Golden Eagle*, 6 FCC Rcd at 5129; *Construction of Broadcast Stations*, 102 FCC 2d at 1057.

174. Since no "substantial progress" had been claimed or demonstrated by RBC in its fifth and sixth extension applications or at the hearing, that leaves only the "reasons clearly beyond the control of the permittee" element of Section 73.3534(b) for RBC to rely on. In this regard, RBC alleged in its fifth and sixth extension applications only that "[a]ctual construction ha[d] been delayed by a dispute with the tower owner."¹⁷ But the findings show that was not a circumstance "clearly beyond the control" of RBC which prevented it from building. It was an economic judgment by RBC not to proceed with construction because of "the emergence of a competing station [Press's station (WCKF)] into the same market," *Community Service Telecasters*, 6 FCC Rcd at 6028, and it is well established that such economic judgments do not constitute causes beyond the permittee's control. *New Orleans Channel 20*, 104 FCC 2d 313; *Hymen Lake*, 56 FCC 2d at 381.

¹⁷ In *Press*, the Court of Appeals rejected the notion that RBC did not intend to represent to the Commission that the tower dispute precluded it from constructing. The Court held that this idea is "flatly inconsistent with the clear import of [RBC's] representation." 59 F.3d at 1371. This is the law of the case.

175. In fact, Mr. Rey testified under oath in the Miami Tower Litigation in December 1990, a few months after the Supreme Court denied rehearing in the *Metro Broadcasting* case, that he knew RBC could construct at any time. The decision not to construct was thus a purely voluntary one on RBC's part. That was demonstrated by the fact that, when RBC's effort to obtain a preliminary injunction was denied on June 6, 1991, RBC announced that it intended to proceed immediately with construction, proving that RBC knew that the lack of a preliminary injunction was not a bar to construction.

176. As a result, RBC could not legitimately claim that it had been prevented from constructing by circumstances beyond its control. To the contrary, the entire "dispute" cited by RBC was a matter which was entirely within RBC's control. But that "dispute" was the "sole basis" for an extension stated by RBC in its fifth and sixth extension applications. *Press*, 59 F.3d at 1371. Because of that, it is concluded that RBC had made a deliberate, voluntary private business judgment not to construct during the relevant extension term. The clear import of RBC's lawsuit against Gannett -- and the gist of Mr. Rey's vivid testimony about his pessimistic views of the economy in 1990 and 1991 -- is that RBC elected not to construct in order to avoid a potentially undesirable competitive environment in late 1990 through mid-1991. But it is well established that "a permittee who postpones construction solely for economic considerations is deemed to have exercised its independent business judgment and the failure to construct is not attributed to circumstances beyond the permittee's control." *Hymen Lake*, 56 FCC 2d at 381.¹⁸ See also *New Orleans Channel 20, Inc.*, 104

¹⁸ In *Hymen Lake*, the Review Board ultimately granted an extension application under the former, more liberal extension rule (the predecessor to Section 73.3534) where "the proposed assignee ha[d] given a firm and unequivocal commitment to promptly complete construction"

FCC 2d at 313; *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026; *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5260. Therefore, it is concluded that RBC has failed to satisfy any of the three criteria set forth in Section 73.3534(b), and RBC's applications must therefore be denied.

177. It is further concluded that Mr. Rey's repeated testimony -- that RBC should have been afforded the "normal" 24-month construction period provided by Section 73.3598 measured from August 30, 1990, the date the Supreme Court denied rehearing in *Metro Broadcasting* (Tr. 756) -- is rejected as a basis for granting an extension in this case. As the Court of Appeals held in *Press*, 59 F.3d at 1371-72, Mr. Rey's "belief" is inconsistent with the plain language of the rule, which provides for a 24-month construction period (Section 73.3598(a)) and manifests that the period for construction runs from the date of the original permit, not of actual construction or of any subsequent extension. This is the law of the case and determines the issue of when RBC had to construct. In any event, Mr. Rey also testified that when RBC finally got around to constructing its station, it was able to complete construction in only 7 1/2 months, thus belying the claim that RBC actually needed two years from a "final grant" in which to construct.

178. Since RBC's original construction permit was issued on April 22, 1986, RBC was required to apply and qualify under Section 73.3534(b) for extensions after April 22,

and "a grant of the application would expedite the institution of a first local outlet in the area, a goal which the Commission has traditionally regarded as an important public interest benefit." 56 FCC 2d at 381. Neither of these factors helps RBC on this record because the extension rule (§ 73.3534) was amended in 1985 to establish stricter guidelines for granting extension applications, and there is no evidence in this case that RBC would provide a first local broadcast outlet to Orlando.

1988. However, the findings show that after the grant of four extensions on the basis of then pending appellate litigation, RBC failed to make the required showing of progress under subsections (b)(1) or (b)(2) or of hardship under subsection (b)(3) in its fifth and sixth extension applications. The Miami Tower Litigation, cited in RBC's fifth and sixth extension applications, was not a factor beyond RBC's control and did not preclude RBC from beginning construction.

179. In sum, RBC failed to make the showing required to obtain an extension under Section 73.3534(b) of the Commission's Rules. See *Carolyn S. Hagedorn*, 11 FCC Rcd 1695. Specifically, RBC did not show that it had made substantial progress toward construction *or* that circumstances "clearly beyond" its "control" prevented construction after the Supreme Court denied rehearing in *Metro Broadcasting* or during the six-month construction period authorized by the grant of the fifth extension. The tower dispute in *Rey v. Gannett* was not over whether RBC could proceed with construction, but rather whether RBC's asserted claim of exclusivity for certain leased space prevented its competitor, Press, from co-locating on the same tower. See *Rey v. Gannett*, 766 F.Supp. at 1143. As such, the decision not to proceed with construction reflected an "independent business judgment" on RBC's part, a circumstance within its control. *Hymen Lake*, 56 FCC 2d 379. See *Carolyn S. Hagedorn*, 11 FCC Rcd at 1697.

180. The Commission's statement in its 1985 report and order amending the rules at issue in this proceeding is instructive:

We are amending Section 73.3598 to provide what, under present circumstances, are more realistic time periods for construction. Permittees should nevertheless be advised that we expect station construction to commence and be brought to

fruition *expeditiously*. Moreover, applications for extension of time to construct broadcast stations will be carefully scrutinized. Thus, unwarranted delays will be avoided and service to the public expedited. *If stations are not constructed within the allowed time, permittees will lose their authorizations.* Others more able to commence operations and provide expeditious service to the public will be given the opportunity to apply for the frequency involved.

Construction of Broadcast Stations, 102 FCC 2d at 1057 (emphasis added and footnote omitted). It is concluded that RBC did not act "expeditiously" to construct its station, that the delay in constructing (eight years after the date of the original construction permit and four years after the Supreme Court denied rehearing in *Metro Broadcasting*) was not warranted, and, therefore, that RBC should "lose [its] authorization[]." *Construction of Broadcast Stations*, 102 FCC 2d at 1057.

181. It is further concluded that RBC did not even attempt to justify a waiver of Section 73.3598(a) by adducing evidence under the issue; therefore, this aspect of the issue must also be resolved against RBC. However, if the evidence in the record adduced by RBC pursuant to the § 73.3534(b) aspect of the issue is considered, it is concluded that this evidence does not justify a waiver of § 73.3598(a). The rule provides that, "Each original construction permit for the construction of a new TV broadcast station, or to make changes in an existing station, shall specify a period of no more than 24 months from the date of issuance of the original construction permit within which construction shall be completed and application for license filed."

182. Under Section 1.3 of the Commission's Rules, the Commission may exercise its discretion to waive a rule where there is "good cause" to do so. That discretion, however, "does not contemplate that an agency must or should tolerate evisceration of a rule

by waivers." *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*). Rather, applicants like RBC generally face a "high hurdle" to show that a waiver is justified. *Id.* at 1153. A waiver of the Commission's rules is appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990); *WAIT Radio*, 418 F.2d at 1157. The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio*, 418 F.2d at 1159.

183. In this case, although RBC may have had good cause for not going forward with construction between April 1986 and August 1990 -- during the pendency of the litigation in the Court of Appeals and the Supreme Court challenging the grant of RBC's construction permit -- there was no legitimate reason for RBC not to begin construction shortly after the Supreme Court denied rehearing in *Metro Broadcasting* on August 30, 1990. However, RBC voluntarily chose not to go forward with construction after the Supreme Court denied rehearing and the reason for not doing so was purely a private business judgment on RBC's part. *Hymen Lake*, 56 FCC 2d at 381. It was not for reasons clearly beyond RBC's control. *Id.* Therefore, there is no factual basis on this record to support a grant of a waiver of Section 73.3598 and Issue 4 should be resolved against RBC.

ULTIMATE CONCLUSIONS

184. It is concluded that RBC was, at a minimum, lacking in candor with respect to its financial qualifications regarding its ability to construct and initially operate its station, in violation of Sections 1.17 and 73.1015 of the Commission's rules or otherwise.

185. It is further concluded that RBC was, at a minimum, lacking in candor regarding the nature of the tower litigation in terms of its failure to construct in connection with its fifth and sixth extension applications, in violation of Sections 1.17 and 73.1015 of the Commission's rules or otherwise.


186. It is further concluded that RBC has not demonstrated that under the circumstances a grant of a waiver of Section 73.3598(a) or grant of an extension under Section 73.3534(b) is justified.

187. It is further concluded that RBC did not intentionally violate Sections 1.1208 and 1.1210 of the Commission's *ex parte* rules by (a) soliciting a third party in late June 1993 to call the Commission on RBC's behalf, and (b) by meeting with members of the Commission staff on July 1, 1993 to discuss the merits of RBC's applications. Therefore, it would be inappropriate to disqualify RBC under this issue.

188. Finally, it is concluded that, in light of the evidence adduced pursuant to issues 2, 3, and 4, RBC is not qualified to be a Commission licensee and a grant of the subject applications would not serve the public interest, convenience and necessity. Therefore, RBC's applications for extension of time to construct (BMPCT-910125KE & BMPCT-910625KP) should be denied, its application for a *pro forma* assignment of its construction permit to RBL (BTCCT-911129KT) should be dismissed as moot, its construction permit

should be cancelled, and its call sign should be deleted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Stewart A. Block", written over a horizontal line.

~~David Silberman~~

Stewart A. Block

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September 26, 1996

CERTIFICATE OF SERVICE


I hereby certify that copies of the foregoing Separate Trial Staff's Proposed Findings of Fact and Conclusions of Law were delivered by hand this 26th day of September 1996, to the following:

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